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U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

The United States of America, Plaintiff, vs. The Town of Oyster Bay, et al., Defendants.	Docket #CV-14-2317 (ADS)(SIL) United States Courthouse Central Islip, New York November 23, 2015 11:21 a.m.

TRANSCRIPT OF HEARING ON MOTION SEEKING CLARIFICATION
BEFORE THE HONORABLE STEVEN I. LOCKE
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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THE CLERK: Calling case 14-CV-2317, The United States of America vs. The Town of Oyster Bay, et al. Counsel, please state your appearance on the record.

MR. GOLDBERGER: Good morning, Your Honor. Michael Goldberger, Assistant United States Attorney for the United States.

MR. HERMAN: Good morning, Your Honor. Anthony Herman from Covington & Burling.

THE COURT: Good morning. Please be seated. We are here on Defendant's Motion Seeking Clarification, docket entry 62. I always get a little concerned when I see the word clarification in a motion. So I think I understand what's going on but, Mr. Herman, why don't you tell me what your position is. You don't have to stand. It's up to you, but you need to be by a mike.

MR. HERMAN: (Indiscern.).

THE COURT: If you want to stand, you can use the lectern because you'll be --

MR. HERMAN: I'm happy to sit, Your Honor --

THE COURT: Fine.

MR. HERMAN: -- if that's fine with the Court. Your Honor, our position really is quite simple. Repeatedly Mr. Goldberger has asked the Court to extend the number of depositions beyond the presumptive 10 to 20. And repeatedly the Court has said I'm willing to consider that at the proper time. And that seems to us to be a perfectly reasonable and fine result. And at the last status conference, when the issue came up, Your Honor advised Mr. Goldberger take your next -- take six more, that will be a total of 10, and then on December 15th, we'll come back for status and see where we are.

Well, Mr. Goldberger noticed six and the six did not include at least one person who I think everyone would say is critically important to the case and that's Supervisor John Venditto, who's a named Defendant in the case. The six also did not include David Portman, who Mr. Goldberger described before Your Honor as someone -- a consultant, former consultant to the town with {quote} "driving knowledge" of the facts. And finally did not name Jack Libert, who, at least Mr. Goldberger believes, is critically important to the case and said as much to Your Honor.

So what it looks to us is if Mr. Goldberger is trying to gain the system to preordain getting more than 10 depositions and we think that's unfair and we're asking the Court to clarify that so the parties know the rules of the road.

THE COURT: I'm not sure that that's the standard, though. Let's say he took the Defendants and the depositions in the order that you perceive to be most appropriate, and then he came back and said I need the six who are actually noticed now. The standard isn't who are the best deponent, it's going to be if these other six have discoverable information, isn't it?

MR. HERMAN: Well, here's the thing, Your Honor. I don't think -- and I mean to speak for Mr. Goldberger. He'll speak --

THE COURT: He'll get a chance to speak as long as he likes.

MR. HERMAN: -- for himself. But it seems to me -- take Supervisor Venditto.

THE COURT: Yes.

MR. HERMAN: I think it's undeniably the fact that they're going to want to depose him. I mean, I certainly would want to depose him if I were --

THE COURT: Well, what if he thinks these six people may have information that make that deposition more fruitful?

MR. HERMAN: Well, but isn't the proper course to take Mr. Venditto's deposition first and then -- I mean, you're supposed to take your best --

THE COURT: That's a strategic decision that Mr. Goldberger's got to make, right?

MR. HERMAN: He's supposed to take your best 10. Well, here's the problem. He's going to -- it preordains him getting -- Mr. Goldberger getting 11, and 12, and 13, and there's a burden associated with that to the Town. The Town is a municipality.

THE COURT: Yes.

MR. HERMAN: It's not a big company. There are legal fees incurred.

THE COURT: Yes.

MR. HERMAN: It's burdensome to the Town. And that -- it seems to us that most Courts, I think, a suggestion of most Courts is that it's incumbent on the proponent seeking to take the depositions, take the best 10, and then to go from there. And we think that that would be the test here, Your Honor.

THE COURT: All right. Mr. Goldberger?

MR. GOLDBERGER: Well, I don't think that is the standard, Your Honor. The standard is whether the witnesses who we seek to depose have discoverable information and have relevant admissible information.

THE COURT: I'm sorry, before you go, you don't disagree that the six that are named may have some -- if they're the final six, you have no objection?

MR. HERMAN: We would not object --

THE COURT: Okay.

MR. HERMAN: -- to any of the six, Your Honor. No.

THE COURT: All right. Okay. I'm sorry, go ahead, Mr. Goldberg.

MR. GOLDBERG: Thank you, Your Honor. No, I think it's fairly simple. All right, let me just make one correction. Mr. Herman said earlier that Mr. Libert was not named among the six. Mr. Libert is, in fact, one of the six --

THE COURT: Okay.

MR. GOLDBERGER: -- people named.

MR. HERMAN: (Indiscern.) --

MR. GOLDBERGER: If I could just finish, Your Honor.

THE COURT: Let him finish. You'll get the -- everybody will speak as long as they like.

MR. HERMAN: Okay. Thank you.

MR. GOLDBERGER: The standard is, as you say, is a question of whether these witnesses have discoverable information. And what Mr. Herman is attempting to do is essentially attempting to try to drive our strategy in terms of taking depositions. And I think you identified correctly that we are seeking to take the depositions of witnesses before Mr. Venditto and before Mr. Portman in order to be able to make sure that we have all the information we need to make those depositions most useful and most productive, and also not spend a lot of time wasting our time taking depositions or asking questions in those depositions that those individuals might not have the answer to.

This is a very challenging case because there are so many witnesses in the case who have information. This is not a small car accident where there were three people or two witnesses involved. This is about the decision making and implementation processes of the Town of Oyster Bay, which is not something -- for two programs, not just one that is -- and that decision making process, the process of creating the program was among many people.

The first depositions we took were witnesses we thought would be very informative for us. And in fact, what we discovered when we took the depositions of Leslie Maccarone and Frank DeStefano, who were the Commissioner of Planning and Development and the Deputy Commissioner, and the other depositions and the documents that indicated those were people who were very heavily involved in the processes. Both witnesses essentially either had no recollection of things, even simple things like signing a document, but also just did not have that material information that we were looking for.

So, you know, in some senses, discovery is the process of finding out who the important witnesses are and who are not, learning which witnesses might be actually in possession of the material information. Ultimately, we are going to take the depositions of Mr. Venditto and Mr. Portman and other inidividuals. But I think we need to be the ones to determine the strategy and the order, not Mr. Herman.

MR. HERMAN: I take no issue with that up to 10. Of course, Mr. Goldberger --

THE COURT: Well, look, I mean --

MR. HERMAN: So, Your Honor, respectfully.

THE COURT: Yes.

MR. HERMAN: If the Court's ruling is that Mr. Goldberger gets his 10, any 10 that he sees fit, and then he gets Venditto and Portman and Libert. By the way, Libert is not among the six that Mr. Goldberger told us he wanted to depose. He is in the letter to the Court, but in the letter to the Court, there are actually seven. So I'm a little perplexed about Mr. Libert.

THE COURT: Okay, I don't --

MR. HERMAN: But put that to the side, Your Honor.

THE COURT: Okay.

MR. HERMAN: If Mr. Goldberger says he needs to take a few other -- some other people before he gets to Venditto, Portman, and Libert, then he should be confined to three or four. And then we have no problem with it. All we're saying is there's a presumptive 10. Mr. Goldberger has not met the burden. Every Court says that 10 is presumptive. The party seeking to go beyond the 10 has the burden of showing why those -- why the additional deponents are necessary and not cumulative or otherwise, we'd be here with 30, and 40, and 50 depositions.

THE COURT: Well, there are cases with 30, and 40, and 50 depositions.

MR. HERMAN: There -- to be sure, there are, Your

Honor. And Mr. Goldberger may have an opportunity to put that showing on before the Court, but he's got to make that showing. He can't gain the system by preordaining the fact that there are going to be more than 10, and that's what he's proposing to do, Your Honor.

THE COURT: Go ahead.

MR. GOLDBERGER: Nothing of the sort, Your Honor. And in fact what Mr. Herman is really trying to do is he's objecting to the fact that the Court said three weeks ago take your next six depositions. To date, despite the fact that we've had numerous conversations, they have not provided me with a single -- I gave them a bunch of dates for depositions. I've gotten no response other than these letters. This is a question for the Court at the point -- I mean, I'm happy to discuss this now. And frankly, I would love to resolve this issue so that we can go forward with depositions without constant bickering and back and forth. But this is a question that's premature because the Court directed us to take the next six depositions and all we're getting from the other side is opposition.

MR. HERMAN: But the problem, Your Honor, is we all know that when Mr. Goldberger comes back and says, okay, I've taken these 10. And now I need supervisor Venditto, and I need Deputy Town Supervisor Leonard Genova, and I need David Portman, and I need Jack Libert. He's not on the list. I don't know if he is or he isn't.

THE COURT: All right.

MR. HERMAN: You're going to say, Mr. Herman, isn't that right? And I'm going to be hard pressed to argue it's not. How can I possibly argue that deposing the Defendant in the case, the main Defendant isn't appropriate? It is. Of course it is.

THE COURT: Look, you've teed up the issue. Let me ask you this, this is labled -- well, it's not really labeled, but you call it a Motion -- a Letter Motion Seeking Clarification. In your perfect world, you walk into here today, you walk out. What is the relief you've gotten?

MR. HERMAN: I think what we need -- the relief that we're seeking, Your Honor, is to suggest to Mr. Goldberger that he take his best 10.

THE COURT: Okay.

MR. HERMAN: And if Venditto, Genova, Portman, Libert are among the best 10, they should be among the best 10.

THE COURT: Here's my problem with that. As a native to this case, it's obvious that those would be the best 10. But the precedent of me or any Judge picking the best 10 for the purposes of constructing a deposition schedule, I think is fraught. I do. I don't think that's the role of the Court here. Mr. Goldberger is able to choose 10 and make --

and risk whatever he's risking in doing so given the nature of the presumption under Rule 30, and then come back and explain why he chose those 10 and why the next 5 are necessary or whatever it is, and we go from there.

MR. HERMAN: But, Your Honor, how are we going to be able to argue successfully that it's not appropriate -- let's take Supervisor Venditto.

THE COURT: Right.

MR. HERMAN: Who's a named Defendant in the case. How are we going to persuade Your Honor that it's not appropriate to take his deposition? Even if six of the deponents turned out to be marginal and almost silly, and by the way, we're not objecting, but I think we're going to be able to make that case to Your Honor.

THE COURT: That's also, I think, a little bit tricky. On the one hand saying they're peripheral and silly, on the other hand not objecting to them being deposed. Now, I have no idea who these people are or what they're going to say.

MR. HERMAN: They're former -- some of them are current Town employees. Some of them are former Town employees.

THE COURT: So I thought they had votes on the process or --

MR. HERMAN: So, I mean, yeah -- I mean -- the other thing to keep in mind, Your Honor, here that's important is Mr. Goldberger conducted the interviews, voluntary interviews of some 20 people.

THE COURT: Okay.

MR. HERMAN: Look, I appreciate the Court's dilemma here. And I understand that in a perfect world a proponent of deposition should be able to take 10 that the deponent wants to take within the bounds of the rules. But here we have a situation where it's going to result in more than 10, (indiscern.) would be more than 10. And that's a burden and cost to a municipality that just went through an election where one of the issues was the municipality is spending too much money.

THE COURT: Look, I get all of that and I'm sympathetic to your position. I just don't know at the end of the day that any Court's in a position to say Mr. Goldberger not these six, those six.

MR. HERMAN: Well, why not --

MR. GOLDBERGER: Your Honor, if I may add one other --

MR. HERMAN: -- give Mr. Goldberger three depositions and then say come back and say why you want the next three and not among Venditto, Genova, Portman, Libert.

MR. GOLDBERGER: Your Honor --

THE COURT: Yes, go ahead.

MR. GOLDBERGER: -- I may be able to make this easier for Mr. Herman as well as for the Court, okay?

THE COURT: That would be nice.

MR. GOLDBERGER: And that's fairly simple. If we did it Mr. Herman's way. If we said, Mr. Herman, okay, we will take the people that you think we should be deposing right now, we would inexorably be back here making the same arguments about the other witnesses that we would seek to depose.

THE COURT: Well, that was the point I started with.

MR. GOLDBERGER: Exactly. And Mr. Herman has indicated he has no objection, no substantial objection, to us deposing the people that we have already noticed. So what we're faced with is a situation where it's not that Mr. Herman really objects to the 10, it's that he is trying to manipulate the deposition order for strategic purposes more than anything else.

MR. HERMAN: Not so, Your Honor.

MR. GOLDBERGER: And I think that's just a cynical effort to try to control the situation that he might not be able to otherwise.

THE COURT: Well, leaving cynicism aside, response. Say again.

MR. HERMAN: Mr. Goldberger's allegation is beneath him. He knows better than that. I would tell Your Honor all we're trying to do is cap the depositions at some reasonable number. 10 is the presumptive limit. I don't care who Mr. Goldberger takes among the 10. And if Mr. Goldberger wants to come back after taking the Defendant and the others who are obvious among the 10 and make the case that he needs others, and he succeeds in persuading the Court of that, that's fine. I'm skeptical that he'll be able to do that.

THE COURT: Okay.

MR. GOLDBERGER: Your Honor --

THE COURT: You're less skeptical.

MR. GOLDBERGER: I'm sorry?

THE COURT: Are you less skeptical that you'll be able to do that?

MR. GOLDBERGER: I am less skeptical. The list that we had submitted to the Court which was attached to our letter and was also a -- the subject -- which we handed up the last time we were here makes pretty clear that this is the core group of people as we understand it from the documents that were involved in two programs. And we actually have three -- six people for the golden age program, okay? There are four that we've taken so far, which leaves approximately 11 people including six counsel members, and those depositions are not going to be long, Your Honor.

THE COURT: Okay.

MR. GOLDBERGER: These are people who have some knowledge of the circumstances under which the legislation was passed and that is highly relevant. Now it may be that Mr. Herman wants to try to negotiate, try to work something out so we take certain depositions and leave other ones aside because they may be -- he may make a representation to us that they are unnecessary, or redundant, or cumulative, or whatever.

THE COURT: In other words, take three counsel members and say, look, the other three are just going to say the same thing.

MR. GOLDBERGER: Well, exactly --

THE COURT: Is that -- okay.

MR. GOLDBERGER: -- if that's the representation he's going to make. It may be that ultimately we learn something different and we need to take those other counsel members. But what we're hearing here is this rigid -- an effort at a rigid adherence to a presumption of 10 that is based on the notion that that's all we should get even though this is a complex case, and even though the case law is quite clear that so long as we can show that these are relevant witnesses with discoverable information that the Court should, under Rule 26 and Rule 30, provide -- actually must allow for those depositions.

THE COURT: Okay.

MR. GOLDBERGER: That's all we're seeking to do.

And right now, quite frankly, all we're trying to do, Your Honor, is take the six.

THE COURT: Right.

MR. HERMAN: You see, Your Honor, and that's the point. Mr. Goldberger is trying to relitigate once again for the third time the opportunity to take more than 10. And twice before, I think Your Honor had so no, this isn't the right time.

THE COURT: Well, yes and no in a sense. This is your motion. You brought us here, not him.

MR. HERMAN: I did, Your Honor.

THE COURT: So that's -- I understand your point, but I don't know if that's entirely accurate. I've heard both sides. I get your position. I understand what your concern is. I understand your intent. I understand the Government's position with respect to the number of depositions. At its core, the Government thinks it's going to be more than 10. Whether or not that's appropriate, we will see. But right now the -- I don't know how you grant or deny a Motion for Clarification.

I guess the Motion for Clarification is granted and clarified as follows. The Defendants are directed to give -- produce the six witnesses that were noticed as they are noticed. The Court is not going to step in and reconfigure the order of the depositions. I don't think that's appropriate. So get those dates together. We still have a status conference on for the middle of December I think.

MR. GOLDBERGER: We do, Your Honor --

THE COURT: We can move that, though, to accommodate the dates. That's not -- I'm more (indiscern.) about moving the case, not the dates on which we reappear. So give me a reasonable amount of time for us to have the status conference. And I'll even push it out further if you want to letter brief the Motion for -- just to allow for a briefing of that if, indeed, we go that way. It looks like we are.

MR. GOLDBERGER: Yeah.

THE COURT: But I think it can be briefed in a letter motion. I'll give you more pages if there are so many witnesses that you need a couple of sentences about each.

MR. GOLDBERGER: Sure. That's easy, Your Honor. Your Honor, at this point we have -- between now and the 18th only one date -- one week -- of possible -- possible for the depositions because as I had indicated at our last conference, I'm on annual leave from the 8th to the 15th. So I can do -- I'm certainly available to take depositions next week. I can do it the week of the 21st, the 28th into January. So --

THE COURT: The 28th of?

MR. GOLDBERGER: Of December, Your Honor. I mean, I know that interferes with some of the holidays and I don't want to upset anybody's holidays. I'm just saying my availability.

THE COURT: No, no, no. You're both going to get to weigh in on your calendars. That's not the problem.

MR. GOLDBERGER: Of course.

THE COURT: I understand what you said. So you think you can get it done by the 20th of December?

MR. GOLDBERGER: No, Your Honor. I don't expect that we can.

THE COURT: Okay, when do you think you can get it done by?

MR. GOLDBERGER: I would say -- let's say January 15th at this point.

THE COURT: Okay. Mr. Herman?

MR. HERMAN: I think that is optimistic. I'm hopeful that we can. The problem is, Your Honor, and Mr. Goldberger was aware of this there was a very complicated Town election that only settled I think it was Thursday or Friday.

THE COURT: Okay.

MR. HERMAN: And so we lost some time in being able to reach out to people. Some of these people are third party Defendants. We're still trying to work out whether we're going to represent them or not.

THE COURT: All right. Why don't we do this? Why don't we make it January 22nd, and I'll give you an extra week to produce everybody. I'd rather you get it done before you come back. After that deposition occurs, I'm going to give you some time to brief letter motions if this does go in that direction. From the 22nd to -- how much time, Mr. Goldberger, would you need to file a letter motion regarding the -- whatever the number is?

MR. GOLDBERGER: A couple of weeks, Your Honor.

THE COURT: All right. So we'll say February 12th for moving papers.

MR. HERMAN: Your Honor, I'm sorry to do this. I'm looking at my calendar. I'm actually away -- out of the country from the 9th of January until 19th, so I'm a little bit --

THE COURT: Of January?

MR. HERMAN: Yes. I'm a little worried about the 22nd for the status conference.

THE COURT: All right.

MR. HERMAN: And I'm worried only in the sense, I'm worried we aren't going to be able to get anything done.

THE COURT: All right. We'll make it the 29th. You still get your two weeks, Mr. Goldberger.

MR. GOLDBERGER: Thank you, Your Honor.

THE COURT: So that will make it -- wait, I made a mistake anyway. That still makes it February 12th.

MR. GOLDBERGER: I'm sorry?

THE COURT: I made a mistake calculating it. It still makes it February 12th.

MR. GOLDBERGER: Okay.

THE COURT: Mr. Herman, how much time do you need to oppose?

MR. HERMAN: I'm sorry, Your Honor?

THE COURT: How much time do you need to oppose?

MR. HERMAN: Two weeks.

MR. GOLDBERGER: And these are three page letter motions, Your Honor?

THE COURT: Well, we're going to -- I'm going to talk about that in one second. Let me just get the date down.

MR. GOLDBERGER: Sure.

THE COURT: The 26th. My recollection is that you said you were anticipating something between 15 and 20 depositions if you had your druthers, Mr. Goldberger. How much -- how many pages would you need to brief this in a letter motion? Because if you're going to give me a little bit about the witnesses, you may need more than three pages. I'd rather you not, like, you know tamper with margins and footnotes and attachments. Just give me a real letter motion.

MR. GOLDBERGER: Sure, yeah, no I'd prefer not to do that either, Your Honor. Each of these witnesses can be described fairly briefly as to their --

THE COURT: Okay.

MR. GOLDBERGER: A paragraph for each, but that's a lot of paragraphs already. So I don't know to be --

THE COURT: You may be able to group them, too.

MR. GOLDBERGER: I'm sorry?

THE COURT: You may be able to group them.

MR. GOLDBERGER: Yes, absolutely.

THE COURT: If there are four council members, they may be --

MR. GOLDBERGER: Absolutely.

THE COURT: Okay. So what do you think?

MR. GOLDBERGER: Seven pages, Your Honor.

THE COURT: Mr. Herman, would you like seven pages?

MR. HERMAN: Seven pages is fine, Your Honor.

THE COURT: Okay.

MR. GOLDBERGER: Thank you, Your Honor.

THE COURT: I don't think this is a particularly hard issue to wrap one's brain around, so I don't think you'll need an oral argument for it. If I read the papers and I want to call you in, I'll do it then. Otherwise, I'll save everyone a trip. Then from that point, I guess, we'll figure out discovery going forward once it's -- once you have the ruling. Okay? Is there anything else, Mr. Goldberger?

MR. GOLDBERGER: No, Your Honor.

THE COURT: Mr. Herman?

MR. HERMAN: Thank you, Your Honor, no.

THE COURT: All right. Thank you both. We are concluded.

(Court adjourned)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

3/30/16

Signature of Transcriber

Date